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TEO SOO CHUAN

v.

THE STATE GOVERNMENT OF SARAWAK & ORS

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HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG J
[ORIGINATING SUMMONS NO: KCH-24-5-2011]
24 AUGUST 2011

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LAND LAW: *Easement - Extinguishment of - Breach of terms of easements - Allegation of - Whether only Registrar of Lands & Surveys Department has power to extinguish and remove easements - Whether court has power to declare easements as being extinguished - Whether arbitrator the correct forum to hear dispute - Whether plaintiff could seek redress from court on transgression of his right as owner of land - Whether plaintiff should be paid compensation - Sarawak Land Code, s. 141 - Rules of the High Court 1980, O. 15 r. 16*

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The plaintiff had inherited a piece of land from his father ('the deceased'). In the 1950's, the deceased had by way of two instruments (Instrument No. L1457/1956 and Instrument No. L1551/1957) created an easement and a right of way over the property in favour of four neighbouring lots which were occupied by nine families back then. Presently, the eight lots had been subdivided and more than eighty units of terraced houses had been built thereon. What was originally a footpath had since become a full scale, dual carriage way public road facilitated by the act of the Municipal Council in tar sealing it. The Municipal Council had also installed street lights and had built and maintained the drains along the said road. The plaintiff was aggrieved by what he claimed to be a breach of the terms of the easements and the failure of the State Government in getting his consent before approving the sub-division of the eight lots and the negligence of the Director of Lands & Surveys in approving the sub-division without acquiring the plaintiff's land for road reserve and access to the sub-divided lots. The plaintiff's complaints to both the Director of Lands & Surveys and the Municipal Council fell on deaf ears, thus he filed this action to assert his right over the alleged unlawful usage of his land by the said authorities. The defendants, however, submitted that: (i) under s. 141 of the Sarawak Land Code, only the Registrar of the Lands & Surveys

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Department had the power to extinguish and remove the easements; (ii) the court does not have the power to declare the easements as being extinguished; and (iii) the correct forum to hear this dispute was an arbitrator.

Held (plaintiff to be paid compensation):

(1) Section 141 of the Sarawak Land Code merely confers on the Registrar the authority to enter in the register the fact that the easement had been determined and extinguished and to give notice to the person affected holding interest under the easement of his intention to make the said entry in the proviso power conferred by the section on him. It is purely administrative and not quasi judicial. Thus, when the statutory provisions are silent and the court's jurisdiction is not specifically ousted by any law, it has the jurisdiction to determine the dispute brought before it in order to make declaratory orders under O. 15 r. 16 of the Rules of the High Court 1980. (para 11)

(2) The plaintiff had made diligent attempts to get his grievance resolved by the second, third and fourth defendants but to no avail. To throw back this case to the Registrar of Lands & Surveys Department was akin to expecting him to go on banging on closed doors and worse, asking him to seek redress from the very person who had denied him of the same. (para 12)

(3) The dispute herein was not between the dominant tenement and the servient tenement but between the servient tenement and the relevant authorities for making the right of way a comfortable ride for the owners of the sub-divided lots. Thus, the clause for an arbitrator to be the correct forum to hear the dispute found in the instruments which created the easements was not applicable. (para 13)

(4) When the right of way was given it was for the use of four owners and of course other persons authorised as described in the instruments. It was also patently obvious that when the four pieces of land were sub-divided, the usage of that right of way had been increased beyond the comprehension of its grantee. This change in the characteristic usage of the right of

way had caused the easements to be determined. It is highly repugnant for the concept of justice to expect the plaintiff to put up with this change of circumstance without any redress even though the instruments expressly provide that the right of way are for the benefit of the "successors in title" of the grantees. But these "successors in title" cannot be so liberally construed as to include those who hold subdivided titles in the numbers and the magnitude as seen in this case. The object and intent of the easements have clearly been overtaken by events and the passage of time had rendered it otiose. (para 17)

(5) Although the plaintiff could not be stopped from seeking redress from the court on the transgression of his right as owner of the land, but what is right must also be reasonable. This court could not extinguish the easement and return the land over which the right of way was granted back to the plaintiff for that would greatly inconvenience the owners of the sub-divided lots who depended on it to access their homes. In order to preserve the rights of both the plaintiff and the sub-lot owners whilst making the relevant authorities own up to their responsibility, this court declared that the easements have been extinguished and for the first defendant, through the fourth defendant, the Superintendent of Lands & Surveys to acquire from the plaintiff the land, over which the easement had been created. It was the plaintiff's constitutional right to be paid compensation for the acquisition in accordance with the provisions of the Land Code. (para 18)

Case(s) referred to:

Chin & Sons (1955) Sdn Bhd & Ors v. William Crocket & Ors [1997] 4 CLJ Supp 111 HC ***(refd)***

Chin & Sons (1955) Sdn Bhd & Ors v. William Crocket & Ors [2000] 1 LNS 3 HC ***(refd)***

Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor (1) [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC ***(refd)***

Graham & Anor v. Philcox & Anor 1984 1 QB 747 ***(refd)***

Lee Tat Development Pte Ltd v. Management Corporation of Orange Heights Strata Title No. 301 [1992] 2 SLR 865 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 15 r. 16

Sarawak Land Code, ss. 112(2), 137, 141, 183(1), (2)

For the plaintiff - CJ Eng; M/s CJ Eng Advos
For the defendants - Yap Khan Kee; SC (Sarawak)

Reported by Suhainah Wahiduddin

JUDGMENT

Rhodzariah Bujang J:

[1] The plaintiff had inherited a piece of land, Lot 27 Section 58 Kuching Town Land District from his father who passed away in February 1998. Way back in the mid 1950s, the deceased had by way of two instruments created an easement and a right of way over the property in favour of four neighbouring lots, which were occupied, said the plaintiff in his affidavit, by about nine families back then.

[2] Presently, the number of people using the right of way has dramatically increased because of development. The eight lots had been subdivided and more than eighty units of terraced houses have been built on these land. This fact is borne out by the locality plan of the area which he exhibited to his affidavit. So what was originally a footpath had now become a full scale, dual carriage way public road facilitated by the act of the Municipal Council in tar sealing it, twice, in the 1960s and in October 1999. The Municipal Council had also installed street lights, built and maintained the drains along the said road.

[3] The plaintiff is aggrieved by what he claimed to be a breach of the terms of the easements and the failure of the State Government in getting his consent before approving the sub-division of the eight lots and the negligence of the Director of Lands & Surveys in approving the sub-division without acquiring the plaintiff's land for road reserve and access to the sub-divided lots.

[4] The plaintiff's complaints to both the Director of Lands & Surveys and the Municipal Council having fallen on deaf ears, he has filed this originating summons action to assert his right over the alleged unlawful usage of his land by the said authorities.

A **The Easements**

[5] Though made in the mid 1950s, the language used was quite archaic. It granted to the owners ('grantees'), "their successors in title and occupiers for the time being of the
B dominant tenement ... ... their tenants, agents servants workmen licencees and invitees in common with the Grantor and all other persons lawfully using the same from time to time and at all times by day or by night to pass and repass with or without horses or domestic animal of any kind and/or with or without carriages
C vehicles or implements ...

[6] The two easements were created by agreements registered under Instrument No. L1457/1956 and Instrument No. L1551/1957 and though created before the enactment of the Sarawak Land Code, they are deemed registered under it pursuant to
D s. 112(2) of the same. This much I have been appraised from the written submission of Ms Yap Khan Kee who represents all the three authorities I have mentioned in the preceding paragraphs above.

E **The Objections**

[7] Ms Yap Khan Kee has structured her objections to this application along these lines.

F (i) Under s. 141 of the Land Code, only the registrar of the Lands & Surveys Department has the power to extinguish and remove the easements and by the authority of *Lee Tat Development Pte Ltd v. Management Corporation of Orange Heights Strata Title No. 301* [1992] 2 SLR 865, the sub-division of the
G eight lots (the dominant tenement) does not extinguish the easements.

The cited case will be discussed presently.

(ii) The court does not have the power to declare the easements
H as being extinguished.

(iii) The correct forum to hear this dispute, pursuant to cl. (4) in the two instruments creating the easements is an arbitrator.

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The clause reads:

> All differences and disputes which shall arise between the parties hereto or any of them or between one or more on them and the personal representatives of another or others of them or between the respective personal representatives of any of them touching or concerning the premises or any act or thing to be done suffered or omitted in pursuance hereof or touching or concerning the construction of these presents shall be referred to arbitration in accordance with Arbitration Ordinance 1952, or any amendment thereto or re-enactment thereof for the time being in force.

Jurisdiction Of The Court

[8] Ms CJ Eng for the plaintiff has referred me to the case decided by Steve Shim Lip Kiong J (as His Lordship then was) in *Chin & Sons (1955) Sdn Bhd & Ors v. William Crocket & Ors* [1997] 4 CLJ Supp 111 (hereinafter referred to as *Chin & Sons (No. 1)* where His Lordship held that s. 141 read with s. 183 of the Land Code and O. 15 r. 16 of the Rules of the High Court 1980, confer on the court the jurisdiction to make an order of determination or extinguishment of an easement.

[9] Section 183(1) and (2) of the Land Code and O. 15 r. 16 read as follows:

> Section 183 (1) and (2) of the Land Code
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> 183(1) The Registrar, on being served with a copy of a writ of execution or a judgment, decree or order of any court of competent jurisdiction and on being satisfied that an interest in land which is noted on the Register is affected thereby, shall mark on such copy the date of such service and enter a memorandum thereof on the Register, and no dealing with the interest, pursuant to such writ, judgment, decree or order shall be effected until the memorandum has been so entered.
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> (2) After the interest has been dealt with pursuant to any such writ judgment, decree or order, the Registrar shall, on presentation of an instrument in the appropriate form, register such instrument if presented within a period of six months from the date of service on the Registrar, or within such further time as the Court which issued such writ, judgment, decree or order, as the case may be, may in any particular case for special reasons allow, in which case no other instrument dealing with the interest

A and presented after the service of the copy but before the presentation of the first-mentioned instrument shall be registered or be deemed to be presented for registration; but if no such instrument is presented within the period of six months or such extended period as the Court may allow, the writ, judgment, decree or order shall cease to affect the interest.

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Order 15 rule 16

16. Declaratory judgment

C No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

D However, in a strange twist of events, the very same case went for full trial before Ian Chin J whose judgment is reported as *Chin & Sons (1955) Sdn Bhd & Ors v. William Crocket & Ors* [2000] 1 LNS 3 (hereinafter referred to as *Chin & Sons (No.2)*) in which His Lordship came to a contrary view. He held that the court has no power under ss. 137 and 141 of the Land Code to determine E or extinguish an easement. Section 137, said His Lordship does not deal with the extinguishment of easement at all and neither does s. 141 "mention the court let alone conferring it a power to determine or extinguish an easement that is created by a grant".

F **[10]** Sections 137 and 141 read as follows:

Sections 137

(1) When any land or any estate or interest therein is intended to be transferred, the transferor and transferee shall execute for the purpose of registration a memorandum of transfer in Form G in G the First Schedule, which memorandum shall give such description of the land as may be necessary, shall refer to the entry in the Register relating thereto and shall contain a precise statement of the estate or interest intended to be transferred. Every transfer shall be subject to section 31.

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(2) A right of way or other easement over or affecting any land may be created by a grant in Form G (1) in the First Schedule modified to suit the circumstances, any may be made appurtenant to other land, but no such right of way or other easement in respect of land subject to a charge shall be binding on the I chargee, except so far as he has consented thereto.

Sections 141

Where an easement has been determined or extinguished, the Registrar shall, upon proof to his satisfaction of the determination or the extinguishment, make an appropriate entry upon the Register and upon any relevant instrument relating thereto:

Provided that, unless the determination or extinguishment was by effluxion of time or merger, the Registrar before making the entry in the Registrar shall give notice of his intention so to do to all persons appearing to him to be entitled to any interest under the easement or shall give at least one month's notice of his intention in the Gazette.

[11] I appreciate His Lordship's argument that these two sections do not contain specific reference to the court's power to determine an easement but I would respectfully disagree that the absence thereof would oust the court's jurisdiction to make a determination on or an extinguishment of an easement. It is to be noted that in actual fact neither sections specifically confer on the Registrar of Lands & Surveys the power to make such extinguishment or determination. Section 141 in fact merely confers on the registrar the authority to enter in the register the fact that the easement had been determined and extinguished and to give notice to the person affected holding interest under the easement of his intention to make the said entry in the provisio power conferred by the section on him appears to me to be purely administrative in nature and not quasi judicial as Ian Chin J seems to suggest in his judgment. Thus, in my view, when the statutory provisions are silent and the court's jurisdiction is not specifically ousted by any law, I believe that it has the jurisdiction to determine the dispute brought before it in order to make declaratory orders under O. 15 r. 16. I must say that if the law provides an avenue and a procedure for a litigant to address his grievance, that avenue and procedure should be followed but when there is no such clear provision to do so such as in this instant case, I must stress that the court's power to adjudicate on the grievance of the litigant should be implied into the power to make a declaratory order respecting it. If it were not so, the power to make the declaratory order under O. 15 r. 16 would be rendered meaningless. I would therefore agree with the conclusion reached by Steve Shim Lip Kiong J's decision in *Chin & Son (No. 1) (supra)*.

[12] In the facts of this particular case before me, there is compelling reason to reach that conclusion. The plaintiff has made diligent attempts to get his grievance resolved by the 2nd, 3rd and 4th defendants but to no avail. To throw back this case to the Registrar of Lands & Surveys Department is akin to expecting him to go on banging on closed doors and worst, asking him to seek redress from the very person who has denied him of the same.

[13] Whilst I am on this issue of jurisdiction, it would also be pertinent to address the last objection of Ms Yap Khan Kee which is that an arbitrator is the best man to adjudicate this dispute. Whilst I agree that there is such a clause in the two instruments which created the easements, I am of the view that it is not applicable in this case because the dispute here is not between the dominant tenement and the servient tenement but between the servient tenement and the relevant authorities for making the right of way a comfortable ride for the owners of the sub-divided lots. Ms Yap Khan Kee did mention also in her written submission that the proper parties before me should be the owners of these sub-divided lots but I do not agree that this be so because the allegation here, I stressed again, is against the conduct of the relevant authorities, not these owners of the sub-divided lots. My reason for taking this stand would be clearer presently when I next consider the Singapore case. This same point was actually raised in *Chin & Sons (No. 2)* and Ian Chin J referred to the Federal Court's case of *Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor (1)* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 which held that the court can still make binding declarations in the absence of the affected party. I am therefore on firmer ground on rejecting her argument. But before that, I wish to just point out that in *Chin & Sons (No. 1) (supra)* the stand of the Department of Land & Survey was different. It was stated in the judgment of His Lordship at p. 113 thereof that the department themselves recognised, in their letter dated 8 March 1996, four ways in which an easement can be extinguished. The last of that is 'order of the court'. Whilst I appreciate that departmental policies can change over time but it is still worth pointing this out now in this judgment that once upon a time, the 2nd defendant recognised the power that the court has over a determination of an easement.

The Singapore Case of *In Lee Tat Development Pte Ltd (Supra)*

[14] The Court of Appeal in this case held that a sub-division and amalgamation of plots of land are only for the purpose of survey, conveyance and transfer of land and for the issue of document of title. It does not, held the Court of Appeal, extinguish the right of way of and the dominant tenement still exists. Although the above statement collectively refer to sub-division and amalgamation, the facts of the case actually pertain to an amalgamation of land in which a block of condominium was built. The dispute arose when the defendants erected an iron gate at one end and a fence at the other end of their land (the servient tenement) in which a right of way was granted in 1919. The Court of Appeal held that since 'the residents of the condominium block did not subject the servient tenement to such heavy vehicular traffic as to substantially interfere with the right of way of the defendants or to cause a nuisance to the defendants, the decision of the trial judge to, *inter alia*, order removal of the gate and fence was affirmed.

[15] The Court of Appeal relied on an English case, *Graham & Anor v. Philcox & Anor* 1984 1 QB 747 in support of their proposition above. That case also involves 'amalgamation' in that a coach's house was turned into one dwelling and May LJ held as follows:

> In none of the judgments in any of the cases to which Mr. Godfrey referred us is there suggestion that a mere alteration of a dominant tenement to which a right of way may be appurtenant is sufficient to extinguish it, or indeed to affect the entitlement to its use unless as the result of that alteration the extent of the user is thereby increased.
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> In my opinion, therefore, the mere alteration of the coach house into one dwelling cannot have had any effect upon the existence of the right of way. *It should be borne in mind that there was no evidence whatever before the judge that the actual or anticipated user by the plaintiffs of the way was in any way excessive, either in quantity or quality.* (emphasis added).

It is to be noted, as I have emphasised in the above quotation of the English case that there lies, in my reading of it, a qualification made in the ratio relied on by the Singapore Court of Appeal and

that qualification is, if the usage of the right of way is increased or excessive, the right of way is extinguished. I cannot speculate if this point was factored in the consideration of the cited Singapore case but I did notice one distinguishing factor in the Singapore case, mentioned in the judgment of Goh Joon Seng J. That factor is that the servient tenement was a 'reserve for road'. (see p. 866 of the report).

[16] In my view, the fact that the land in the Singapore case is specifically designated for "reserve for road" is material in relation to its usage as one by the occupiers of the dominant tenement and has a bearing on the consideration whether its use is excessive or otherwise.

[17] In the facts before me, it is clear that when the right of way was given, it was for the use of four owners and of course other persons authorised as described in the instruments. It is also patently obvious that when the four pieces of land were sub-divided, the usage of that right of way has been increased beyond the comprehension of its grantee. That it was, to borrow the words of May LJ in *Graham*'s case *(supra)*, excessive in both quantity and quality. This increase is acknowledged by the Municipal Council by its act in tar-sealing the right of way and putting up street lightings and drains along the way. In other words, as Ms CJ Eng rightly submitted, what was essentially a private right of way, has become a public right of way. This change in the characteristic of the usage of the right of way in my view has caused the easements to be determined. It is highly repugnant to the concept of justice to expect the plaintiff to put up with this change of circumstance without any redress even though the instruments expressly provide that the right of way are for the benefit of the "successors in title" of the grantees. But these "successors in title" cannot be so liberally construed as to include those who hold subdivided titles in the numbers and the magnitude as seen in this case. The object and intent of the easements have clearly been overtaken by events and the passage of time has rendered it otiose.

[18] Although in my judgment the plaintiff cannot be stopped from seeking redress from the court on the transgression of his right as owner of the land, but what is right must also be reasonable. I could not extinguish the easement and return the

land over which the right of way was granted back to the plaintiff for that would greatly inconvenience the owners of the sub-divided lots who depended on it to access their homes. What I could, and I think it is the fairest as it preserves the right of both the plaintiff and the sub-lot owners whilst making the relevant authorities own up to their responsibility and duty to the plaintiff, is to declare that the easements have been extinguished and for the 1st defendant, through the 4th defendant, the Superintendent of Lands & Surveys to acquire from the plaintiff the land, over which the easement had been created (prayer (viii) of the originating summons). And, as it is his constitutional right, for the plaintiff to be paid compensation for the acquisition in accordance with the provisions of the Land Code.

[19] Lastly, I would award the plaintiff, cost of RM8,000 as agreed by the parties.